APPENDIX A

Memorandum Opinion of the Circuit Court of Hancock County, West Virginia

IN THE
CIRCUIT COURT OF HANCOCK COUNTY,
WEST VIRGINIA

Civil Action No. 3972

ROBERT WILKERSON,

Plaintiff,

—VS.—

WATERFORD PARK, INC., *et als.,*

Defendants.

Civil Action No. 3973

RUSSELL APPLEBEE,

Plaintiff,

—VS.—

WATERFORD PARK, INC., *et als.,*

Defendants.

Civil Action No. 3974

MILTON J. DALGO,

Plaintiff,

—VS.—

WATERFORD PARK, INC., *et als.,*

Defendants.

MEMORANDUM

Three separate civil actions asking for preliminary injunction and other equitable relief have been brought by three professional jockeys, Robert Wilkerson, Russell Applebee and Milton J. Dalgo, against Waterford Park, Inc. and Carlyle Johnson, Steward; Jay Eyster, Steward; and Joseph P. Brocator, Steward. These actions are numbered respectively Civil Action Nos. 3972, 3973 and 3974.

Plaintiffs seek a mandatory injunction requiring Waterford Park, Inc., a West Virginia corporation, to permit them to ply their trade on defendant, Waterford Park's, premises. The stewards were joined as defendants under the theory that they concurred in Waterford's action in refusing to permit these three riders from coming on Waterford's premises.

Certain reasons have been advanced by these three riders in argument and brief for Waterford's action in refusing to admit them to Waterford's track. No rulings of any nature whatsoever have been made against these three riders by the Board of Stewards.

These three riders appealed to the West Virginia Racing Commission but were turned down on the theory that there was nothing for the West Virginia Racing Commission to review inasmuch as the Board of Stewards had made no rulings against them.

Waterford Park, by its President, James F. Edwards, in writing dated May 2, 1968, notified the plaintiffs that their privileges to enter or remain on the grounds at Waterford were being withdrawn seven days from the receipt of that notice. No reasons for Waterford's action were given, and it is the contention of the defendant, Waterford Park, that no reasons are needed to justify this action, because Waterford has the absolute right at common law to prevent

whomsoever it pleases for any reasons whatsoever, or for no reason whatsoever, to enter upon Waterford property.

Motions to Dismiss have been filed separately by Waterford and by the three stewards.

On two separate occasions time was set aside by the Court to permit the taking of whatever testimony either or both of the sides to this controversy desired to present; but, when the issue became plain that Waterford Park, insofar as the injunctive aspect of this action is concerned, relies absolutely on an alleged "absolute common law right to exclude," counsel agreed to a stipulation, which, in effect, obviated the necessity for taking testimony. This stipulation is as follows:

> "For the purpose of these particular proceedings, the Court has suggested that the parties agree that the injunction portion of these actions shall be severed for the purpose of rulings on the sole issue of whether or not there is an absolute common law right to exclude the plaintiffs from defendant Waterford Park Race Track, from any subsidiary issue of damages.
>
> It is further understood, however, that in the event the plaintiffs secure a favorable ruling upon their prayer for injunction, that the defendant Waterford Park shall not be precluded from the use of any proper defense, if any, that it may have to a claim for damages."

The Court, therefore, is treating the Motions to Dismiss as demurrers and is assuming all facts well pleaded in the Complaints filed to be true.

This ruling, so far as Waterford Park is concerned, is therefore based on the resolution of one issue, and one

issue alone, and that issue is—Does Waterford have an absolute common law right to forbid entry by these three plaintiffs to its grounds?

Extensive briefs have been filed by the parties.

Before proceeding to consider this sole issue as to Waterford, the Motions to Dismiss of the three stewards will be taken up. Their motion is, in effect, based upon the statutory provision contained in Chapter 53, Article 1, Section 2 of the West Virginia Code as to venue.

There can be little doubt that the stewards as a board are an agency of the West Virginia Racing Commission regardless by whom they are appointed or by whom paid. It is this Court's opinion, therefore, that venue against them is improperly laid in Hancock County, and their Motions to Dismiss will be granted.

Waterford Park argues that this Court lacks jurisdiction of the person of Waterford. In this Court's opinion, this contention cannot be sustained, and it is this Court's ruling that it does have jurisdiction of Waterford Park in this sense.

We then come to the important issue in this action. This Court is not unmindful of the predicament in which these plaintiffs find themselves. They are professionals—there can be no question. Their being, in effect, ruled off by Waterford, it must be assumed, does affect their ability to earn a living. The West Virginia Racing Commission by inaction gives them nowhere to turn except to a Court of Equity. This is not meant to be a reflection upon the Board of Stewards or the West Virginia Racing Commission in light of the West Virginia Statute, which forbids the Commission or its agent, from interferring in the internal affairs of a racing association. The wisdom of such

a statute is not an issue here. This Court is well aware of the factual background leading to its adoption.

The law would seem to be settled that a race track does have the right to exclude from the course whomsoever it pleases for whatsoever reason. This would apply equally to patrons and to jockeys—*Martin* v. *Monmouth Park Jockey Club,* 145 Fed. Supp. 439. Plaintiffs seek to distinguish this case on the basis that the jockey there involved was an unsavory character and thus defendant was justified in excluding him. There the jockey's record recited many violations of riding rules, as well as several arrests. We apparently do not have this so far as these three plaintiffs are concerned.

It would appear that it is settled law that a race track does have the right to exclude both jockeys and patrons at will. The case of *Garifine* v. *Monmouth Park Jockey Club,* 148 At. 2nd 1, 29 N.J. 47 reviews practically all of the cases on this particular subject. A reading of these cases show that the arguments used by the plaintiffs in these three cases have been advanced many times. The courts in an almost unbroken line of decisions have rejected these contentions. It is true that there is no West Virginia ruling on this issue. This Court, however, is a nisi prius court and is bound as a matter of policy to follow the settled law of this country, unless it is in conflict with higher authority in this State. I, therefore, reluctantly rule, without regard to equities which may or may not be present on either or both of the sides of this controversy, that Waterford does have the absolute common law right to exclude, whether it be patron, rider or anyone else. The sole exception so far as the cases are involved would appear to be exclusion because of race, creed or color.

Orders may be submitted in conformity with this Memorandum, savings plaintiffs' exceptions thereto. As this is a novel question so far as West Virginia is concerned, I anticipate an appeal from this holding. Counsel's attention is called to several papers contained in the file, which are not properly of record, which it might be well to make part of the record, if it is possible, in the event of an appeal.

JAMES G. MULLEN
Judge

Letter Opinion of the West Virginia Racing Commission Below

(Letterhead of West Virginia Racing Commission)

May 17, 1968

Mr. Donald R. Donell
Attorney at Law
Longo Building
Weirton, West Virginia 26062

Dear Mr. Donell:

Your petition requesting a hearing before this Commission, on behalf of certain named Jockeys at Waterford Park, Inc., has been thoroughly reviewed.

Following due consideration, the Commission respectfully rules as follows:

> In the matter of Robert Wilkerson, Milton Dalgo and Russell Applebee, there are no Steward rulings upon which an appeal to this Commission can be made.
>
> Although your petition alleges action on the part of the Stewards in the case of Ray Cooper, the Commission has not received such ruling and information indicates that there is no such ruling pending.

Since there are no rulings against the named subjects and therefore, no apparent violation of the rules and regulations of this Commission, you are hereby advised that

your request for hearings on behalf of the named Jockeys is denied.

Further, it would appear that the relief sought by your petition is not within the jurisdiction of this Commission.

Very truly yours,

Joseph P. Condry
Chairman

C:r

APPENDIX B

Constitutional, Statutory and Regulatory Provisions Involved

CONSTITUTION OF THE UNITED STATES

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE, TITLE 28

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

. . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Article 23.

Horse Racing.

§ 19-23-1. Racing commission established; meetings; report to governor; number and terms of members; powers and duties.

There is hereby created the West Virginia racing commission, which shall be a corporation and, as such, may contract and be contracted with, sue and be sued, and shall have a corporate seal. Said commission shall have its principal office in the State capitol at Charleston, and shall meet annually at its office in the month of January, and at such other times and places as shall be designated by its chairman. It shall also make and publish annually a report to the governor of the business transacted by it.

The commission shall consist of three members, all of whom shall be actual and bona fide residents of this State and not more than two of whom shall at any one time belong to the same political party. They shall be appointed by the governor by and with the advice and consent of the senate. The term of office of the members of such commission shall be four years, except that of the first appointees, one shall be appointed for two years, one for three years and one for four years, and their appointments shall be made within twenty days after this bill shall become effective, and their successors shall thereafter be appointed for terms of four years each. No person not a bona fide member of the commission shall vote upon or participate in the deliberations of the commission on any matter which may come before it. Said commission shall

have all the powers necessary to carry out fully and effectively all the purposes of this article, and shall have the power to prescribe reasonable regulations under which all races shall be conducted within the State of West Virginia except as hereinafter provided. The commission may at any time, for the violation of any such regulation, or for any fraudulent practices, require the removal of any racing official or racing employee employed by any licensee licensed hereunder; and shall have power to summon witnesses and to administer oaths or affirmations to such witnesses and take testimony whenever in the judgment of said commission it may be necessary for the discharge of its duties. False swearing on the part of any witness shall be deemed perjury and shall be punished as such.

. . . .

§ 19–23–4. License required where horse racing for stake, purse or reward.

No person shall hereafter hold or conduct any horse race meeting within the State of West Virginia whereat horse racing shall be permitted for any stake, purse or reward except under the license of the West Virginia racing commission. . . .

§ 19–23–5. Application for license; determination of racing dates; refusal of application; review.

Any person desiring to conduct a horse race meeting within the State of West Virginia to permit or conduct pari-mutuel pools shall apply to the West Virginia racing commission for a license to do so. . . .

. . . .

In fixing dates for race meetings at the various tracks in this State the commission shall consider the racing circuits with which the race tracks in this State are associated, or contiguous to, and shall also consider dates which are calculated to increase the tax revenues accruing from racing.

. . . .

§ 19–23–6. Procedure for suspension or revocation of license.

The commission shall not suspend or revoke a license until after a hearing has been held in the county wherein the licensee is or has been conducting race meetings. Notice of such hearing shall be served on the licensee at least ten days prior to the hearing. Such notice shall set forth the reasons for such proposed suspension or revocation and be served in the manner set forth in this Code for the service of a summons. Appeal from the decision of the commission shall lie in the circuit court of the county wherein such hearing is held, with the right of appeal to the supreme court of appeals in the manner provided by law.

§ 19–23–7. Per diem tax on tracks; tax on pool contributions; how taxes paid; financial responsibility of licensees; contents of licenses.

Any person operating thoroughbred or running type racing at any horse race track one mile or more in length shall pay each day upon which horse races are run, a license tax of five hundred dollars; any race track less than one mile in length shall pay for each day upon which horse races are run a license tax of two hundred fifty dollars;

Provided, that the per diem tax shall not apply to horse shows or county fairs at which racing is conducted for not more than six days. Any person licensed by the commission to conduct thoroughbred or running type racing and to permit and conduct pari-mutuel wagering under this article shall, in addition to the aforementioned tax, pay to the racing commission of the State of West Virginia a tax of five and three fourths per cent of the total contribution to all pari-mutuel pools conducted or made at any and every race meeting licensed under this article. Such payments shall be made to the commission or its agent after the last race of each day and every day of each and every race meeting, and shall be made from all contributions to all pari-mutuel pools to each and every race of the day, which payment shall be deposited with the treasurer of the State of West Virginia to the credit of the general revenue fund: Provided, however, that a person operating any duly licensed horse race track, having an average daily pari-mutuel pool of one hundred fifty thousand dollars or less, per day, for the licensed race meetings, of the preceding calendar year, shall, in lieu of payment of the five and three fourths per cent tax, paid to the State, from pari-mutuel pools, as above provided, be permitted to conduct pari-mutuel wagering at such horse race track, under this article, on the basis of a daily tax which is fixed as follows: On a daily mutuel pool not exceeding one hundred fifty thousand dollars the daily tax shall be four thousand dollars plus five and three fourths per cent of the daily mutuel pool, if any, in excess of one hundred fifty thousand dollars.

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. . . .

§ 19–23–9. Only pari-mutuel system of wagering permitted; commission of licensee on pari-mutuel pools; minors; auditor.

A person licensed by the commission shall permit only the pari-mutuel system of wagering within the enclosure at which horse racing is held, and the commission deducted by any thoroughbred or running horse race licensee from the said pari-mutuel pools shall not exceed fifteen per cent of the total pari-mutuel pools for the day, including the license fee of the gross amount handled hereinbefore provided for, plus the breakage, which shall be made and calculated to the dime. Such breakage shall be retained by the licensee.

. . . .

§ 19–23–10. Aiding or abetting in conduct of race meet without license; penalty.

Any person aiding or abetting in the conduct of any meeting in the State of West Virginia at which racing and wagering on the same is permitted, without a license duly issued, not suspended or revoked and unappealed from by the commission, shall be guilty of a misdemeanor, ...

. . . .

§ 19–23–13. Licenses for jockeys, etc.; relief fund; restrictions on persons employed; penalties.

The commission may license jockeys, apprentice jockeys, exercise boys, owners, trainers, grooms, platers, stable foremen, valets, veterinarians, authorized agents, jockeys' agents, mutual employees, and such other categories employed on a race track as the commission may deem proper; and may charge a fee therefor. The commission may also

register colors and assumed names, and may charge a fee therefor. . . .

At least eighty per cent of the persons employed by a person licensed to operate a race track or racing meeting shall be citizens and residents of the State and shall have been such citizens and residents for at least one year immediately prior to such employment. . . .

. . . . .

§ 19–23–14. Number of races daily.

The commission shall fix a minimum but not a maximum number of races to be held on any respective racing day.

§ 19–23–15. Internal affairs and business of licensee.

The commission shall not interfere in the internal business or affairs of any licensee.

. . . .

Article 24.

Race Tracks.

§ 19–24–1. Race track construction permits; application therefor; action by racing commission; review.

No person, after the date on which this article becomes effective [June 5, 1953], shall construct a race track where horse race meetings are to be held and the pari-mutuel system of wagering conducted, as provided in article twenty-three [§ 19-23-1 et seq.] of this chapter, unless and until such person shall first have applied for and obtained from the West Virginia racing commission a construction permit which may be issued by said commission in strict accordance with the provisions of this article, and not otherwise. . . .

. . . .

RULES OF RACING

1966

West Virginia Racing Commission

* * * * *

8. These rules govern all races run over the courses of the Associations licensed by the West Virginia Racing Commission.

* * * * *

50. The West Virginia Racing Commission, recognizing the necessity of the obligations of a Racing Association to comply with its requirements under the license granted it by the West Virginia Racing Commission, under the authority of the State of West Virginia, and fulfilling its obligations to the public and the State of West Virginia with the best possible uninterrupted services, in its comparatively short licensed period, herein, provides that all Racing Associations, officials, horsemen, owners, trainers, jockeys, grooms, platers and all licensees, who have accepted directly or indirectly, with reasonable advance notice the conditions under which said Racing Association engages and plans to conduct such race meeting, shall be bound thereby. Any such Racing Association, officials, horsemen, owners, trainers, jockeys, grooms, platers and all licensees who so accept such conditions with reasonable advance notice thereof, shall before they terminate or discontinue their employment, engagements or activities under such accepted conditions, give the West Virginia Racing Commission and the respective Racing Associations with whom they are engaged, at least seven (7) days' notice in writing of their intentions to terminate or discontinue their employment, engagements or activities under

such accepted conditions. The said Commission may upon notice to all parties of interest conduct a hearing or hearings with respect to such, or any termination or discontinuance of employment, engagements or accepted conditions, and if the said Commission shall find that the causes for the said termination or discontinuance of employment, engagements or activities under such accepted conditions are unreasonable or unlawful or contrary to the rules, regulations and conditions of the West Virginia Racing Commission or the statutes of the State of West Virginia, or in bad faith or detrimental to the public interest of against the best interest of horse racing, or if the said Commission shall find that the licensees or said persons have failed to give the required written notice provided, or in any other manner violated this rule, it may in its discretion revoke, cancel, withdraw or suspend the licenses of any such Racing Association, official, horseman, owner, trainer, jockey, groom, plater and other licensee, or may forever bar said person or persons from engaging in any activities at any race track in the State of West Virginia.

If, however, the said Commission shall find that the causes for the said termination or discontinuance of said employment, engagements or activities under such accepted conditions are reasonable, lawful, in good faith, not contrary to the rules, regulations and conditions of the West Virginia Racing Commission and the statutes of the State of West Virginia and not detrimental to the public interest or the best interest of horse racing, then said termination or discontinuance of employment, engagements, or activities under such accepted conditions shall not be grounds for suspension, cancellation or revocation of the licenses of said persons, and the Commission shall so advise all parties in interest and shall use its best efforts to settle any disputes by the between said parties.

51. All Associations granted a license from this Commission shall, at least thirty (30) days before each meeting, submit the names of the officers and a complete list of administrative personnel, showing addresses, duties, and compensations; and, at least ten (10) days prior to the start of each meeting, submit a complete list of employees, with addresses, duties, and compensations. All additions or changes in the above personnel must be promptly reported to the Commission for its approval. An Association failing to furnish such required information may be fined Two Hundred and Fifty Dollars ($250.00) for each day in violation.

(a) The Commission may require an examination for vision and hearing, by a doctor designated by the Commission, before approving any racing official.

52. If any official or employee, mutual or operative, be discharged by the Association, a full report of the reason for discharge shall be made to the Commission.

53. Imposed upon the secretaries of the different Associations conducting racing in West Virginia is a duty of informing the Commission of any change in the personnel of the stockholders or in the holdings of any individual stockholder of the Association for which he is the secretary.

54. The Commission and as it designates to its representatives shall have the right of full and complete entry to any and all points of the grounds of the Association licensed to conduct horse racing in West Virginia.

55. Each Association granted license for a race meeting in West Virginia shall supply the West Virginia Racing Commission with a suitable private office to conduct the business of the Commission.

Excepting the salary of the Stewards representing the Commission, the Auditor of Pari-Mutuels and the License Clerks, the Association shall pay the officials and employees appointed by the Commission and assigned to duty on the grounds of said Association.

56. Each Association conducting races on any tracks shall, before publishing, submit to the Commission the conditions for all races its proposes to hold, together with the stake, purse, or reward, all of which shall be subject to the approval of the Commission. All proposed purses shall be exclusive of any entrance or starting fees that may be charged. The minimum purse given by Racing Associations shall be $1,000.00.

* * * * *

60. The minimum number of races per day at all race tracks under supervision of the West Virginia Racing Commission shall be eight (8).

61. Post time for the first race at each meeting under the supervision of the West Virginia Racing Commission, shall first be approved by the Commission, and each race thereafter shall be run at intervals to be approved by the Commission, unless an emergency arises, and in that event the final decision shall be in the hands of the Steward representing the Commission.

* * * * *

88. Anyone guilty of making a handbook on the grounds of any Association licensed by the Commission, shall be ejected from the ground and denied further admission thereto, and any owner, jockey or other person interested in any horse or horses at said meeting who shall be guilty of betting with or through any such handbook, shall be ejected from the grounds or denied admission by order of the Stewards.

89. If any trainer, jockey, stable employee, or other person solicits bets from the public by correspondence or other methods, to be made on the horses in any stable, such person or persons so offending shall be ruled off the course or denied admission by order of the Stewards.

90. Every person or horse expelled or ruled off by any recognized turf authority for corrupt, fraudulent or improper practice or conduct, shall stand ruled off the courses licensed by the West Virginia Racing Commission.

* * * * *

LICENSES

171. Any license issued by the West Virginia Racing Commission may be revoked on account of corrupt, fraudulent, or improper practice or conduct detrimental to racing on the part of the licensee, by a proceeding before the West Virginia Racing Commission. Rules governing such hearings are as follows:

(a) Said hearings shall be held at the office of West Virginia Racing Commission in Charleston, West Virginia, or at such other place as may be designated in writing by said West Virginia Racing Commission.

(b) Citations for hearings must be issued not less than five (5) nor more than thirty (30) days before the date of the hearing, and such citation shall contain full statements of the charges preferred against the licensee or any other person accused of corrupt, fraudulent, or improper practice.

(c) No citation shall be issued except upon prima facie showing of a violation of the rules or a showing of corrupt, fraudulent, or improper practice on the part of the licensee, or his agent or servant or employee or owner, or upon written complaint of some person of such wrongdoing on the part of the licensee or his agent or servant or employee or owner.

(d) The original of the report of findings of the investigation or complaint by other persons shall be filed with the West Virginia Racing Commission.

(e) The West Virginia Racing Commission holding the hearing shall immediately take the case under advisement, and shall within a reasonable period of time after the hearing make its findings; and, should its findings be to the effect that the licensee or any other person subject to the investigation had been guilty of corrupt, fraudulent, or improper conduct or violation of the rules, the Chief Clerk will at once so notify the licensee or any other person subject to such findings, and a copy of said findings shall be forwarded by registered mail to the last known address of the licensee, or the person who was subject to the investigation.

* * * * *

186. Whenever track conditions are such that jockeys feel they cannot ride over it, the duly appointed representative of the jockeys shall report the matter to the Stewards.

* * * * *

278. The Auditor of Pari-Mutuels shall be afforded every facility for performing all the duties that may be assigned to him by the Commission, including the following:

1. Every Association licensed by the Commission shall furnish the West Virginia Racing Commission copies of their first payroll and any other that might be requested, both mutuel and operative and covering all employees performing services during any race meeting.

2. Carbon copies of all mutuel work sheets are to be turned over to the Auditor of Pari-Mutuels immediately after each race.

3. At the end of each race day, a consolidated report showing detailed figures of the mutuel handle, commission or take and breaks shall be handed to the Auditor of Pari-Mutuels.

4. At the end of each day, every signed complaint made by any customer, with reference to transactions with sellers or cashiers, shall be reported on printed blanks and furnished to the Auditor of Pari-Mutuels.

5. A written report shall be furnished by the manager of the money room of all errors made by the mutuel sellers or cashiers, commonly called "shorts or overs". Such reports shall detail the name of the seller or cashier, his working place, the name of the money room checker discovering the error and the amount involved.

The Stewards

279. There shall be three Stewards for each race meeting. One of the Stewards for each race meeting shall be named by the Commission. The Association holding the meeting shall name the second Steward; and the two Stewards so selected shall name the third. In the event of a disagreement between the two Stewards in naming the third Steward, it shall then become the duty of the West Virginia Racing Commission to make the third appointment. In the event a Steward is temporarily incapacitated or for some sufficient reason cannot serve, he may deputize someone to serve for him in his absence. The name of such deputized person shall be submitted to the Commission for approval as soon as practicable.

All other officials herein designated shall be appointed by the Association holding the meeting, with the exception of one patrol judge, a general inspector, auditor of parimutuels, a license clerk, and the State Veterinarian. All the appointments, including the Stewards, are subject to the approval of the West Virginia Racing Commission, which reserves the right to demand a change of personnel for what it deems good and sufficient reason, the successor to the official so replaced to be subject to the approval of the Commission.

280. The Stewards shall determine all questions arising in reference to racing at the meeting and shall have authority to postpone races. They shall take cognizance of all infractions of the rules and may fine offenders not exceeding Two Hundred and Fifty Dollars ($250.00) suspend, or rule off.

281. The Stewards shall take notice of corrupt riding and other questionable transactions on the turf. Complaint thereof can be made by an owner, trainer or jockey participating in the race or any official representing the Association on the Racing Commission, but in the failure of the complainant to substantiate the charge, he may be fined, suspended or ruled off.

282. The Stewards shall have power to call on any person in whose name a horse is entered to produce proof that the horse entered is not the property either wholly or in part, of any person who is disqualified, or to produce proof of the extent of his interest or property in the horse, and in default of such proof being given to their satisfaction, may declare the horse out of the race.

283. In their discretion, where fraud is suspected, the Stewards shall have the right to put upon a horse a rider selected by them, and to place the horse in charge of a trainer they may select. Any owner or trainer who refuses to permit a rider or trainer to be changed as herein provided, and any trainer or rider who refuses to take charge of or ride a horse on the order of the Stewards shall be ruled off.

284. The Stewards shall have the power at any time to order an examination, by such person or persons as they deem fit, of any horse entered in a race or which has run in the race.

285. It shall be the duty of one or more of the Stewards to be in daily attendance at the office of the Racing Secretary at a time not later than ten (10) minutes before scratch time and to remain until closing of entries.

286. The Stewards shall, not later than seven (7) days after the end of each meeting, make report in writing to the Chairman of the Racing Commission of all infractions of the rules and of the rulings of the Stewards upon matters coming before them during such meeting. Copies thereof shall be mailed to each member of the Commission.

287. The Stewards shall have power to suspend or exclude from the stands and grounds improper and objectionable characters and persons who have been ruled off for corrupt practices on the turf in any country.

288. Any person who is under suspension at other race tracks shall be denied the privilege of the grounds at any race track in West Virginia.

289. The Stewards shall have a discretionary power to warn any person off the premises of the Association, and, in case of such notices being disregarded, to enforce them by proper orders.

290. No person under the age of twenty-one (21) years shall be permitted to wager on any horse or horses on any track licensed by this Racing Commission.

291. If any owner, trainer, jockey, attendant, or any person uses improper language to the racing officials, or if any person be guilty of using profane or indecent language, carrying or exhibiting a deadly weapon, or otherwise disturbing the peace on any race track enclosure, he shall be either fined, suspended, or ruled off.

292. Craps and other species of gambling games played by trainers, jockeys, attendants, or any other persons are

positively forbidden about the stables and grounds of the various associations governed by these rules. The person so offending may be suspended or ruled off.

293. Jockeys, grooms and stable boys are positively forbidden to loiter in the betting enclosure. Those who violate this rule may be fined, suspended, or ruled off.

294. During the term of suspension of any jockey, owner, trainer or other person on any race track in West Virginia under the jurisdiction of this Commission, his badge shall be taken up and he be refused admission to any part of the course; provided that a suspended jockey may be permitted to gallop or exercise horses during the morning hours and to lodge in the course at night.

295. Any person or persons who shall, knowingly, take over to break, train or race, any horse or horses, belonging to or under the supervision, management or control of any person, or persons who stand suspended from the turf may, themselves, be fined or suspended.

296. Where there is no penalty specified for a violation of the racing rules or the regulation of the course, the Stewards shall have the power to fine, suspend, expel from, or rule off the course; and where power is given under these rules to fine, but no maximum amount of such fine is fixed, the Stewards may fine not exceeding Two Hundred Fifty Dollars ($250.00). If any case occurs which is not, or which is alleged not to be provided for by these rules, it shall be determined by the Stewards in such manner as they may think just and conformable to the usage of the turf.

General Inspector

297. The Commission shall appoint an official designated as "General Inspector" whose salary shall be set by the Commission at not less than twenty ($20.00) per day, and shall be paid by the Association. The General Inspector shall have such duties as are assigned to him by the Commission from time to time or by the Steward representing the Commission. All reports shall be made to the Steward.

* * * * *

Patrol Judges

302. The Commission shall appoint an official designated as a "Patrol Judge", whose station on the track shall be designated by the Steward representing the Commission, and shall be subject to the orders of the State Steward. The Association shall pay the State Patrol Judge the same salary paid by it to Patrol Judges appointed by it.

* * * * *

State Veterinarian

317. There shall be two Veterinarians for each race meeting. One Veterinarian shall be named by the Commission, and the Association holding the meeting shall name the other Veterinarian. Their salaries shall be approved by the Commission and paid by the Association. The Veterinarians shall perform the following duties:

Make daily pre-race examinations to determine and approve the fitness of each horse to race.

Be present in the paddock to inspect all horses before each race, and inspect or observe all horses after the finish of the race.

Be present at the starting gate to determine fitness of any injured or otherwise incapacitated horses before the start of each race.

Examine and approve horses that have been retired from racing for a period of six months, in conformity with Rule No. 167.

Supervise and collect saliva, urine, or secretions used in making pre-race or post-race analyses.

APPENDIX C

Petition to Supreme Court of Appeals of West Virginia for Writ of Error

IN THE

CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

Civil Action No. 3972

ROBERT WILKERSON,

Plaintiff,

vs.

WATERFORD PARK, INC., et al.,

Defendants.

Civil Action No. 3973

RUSSELL APPLEBEE,

Plaintiff,

vs.

WATERFORD PARK, INC., et al.,

Defendants.

Civil Action No. 3974

MILTON J. DALGO,

Plaintiff,

vs.

WATERFORD PARK, INC., et al.,

Defendants.

PETITION FOR WRIT OF ERROR

To the Honorable Judges of the Supreme Court of Appeals of West Virginia:

Your Petitioners, ROBERT WILKERSON, RUSSELL APPLEBEE, and MILTON J. DALGO, respectfully represent unto your Honors that they are aggrieved by a final judgment rendered against them, entered in the Circuit Court of Hancock County, West Virginia, on the 15th day of July, 1968.

PROCEEDINGS

Your Petitioners instituted individual Civil Actions in the Circuit Court of said County which thereafter came on for a hearing upon the Motions to Dismiss of the defendants. Waterford Park, Inc., a Corporation, Chester, West Virginia, Carlyle Johnson, Steward, Waterford Park Racetrack, Chester, West Virginia, Jay Eyster, Steward, Waterford Park Racetrack, Chester, West Virginia, and Joseph P. Brocator, Steward, Waterford Park Racetrack, Chester, West Virginia. The Court thereupon granted a consolidation of the aforesaid causes of action and said cases came on to be heard on the 17th day of June, 1968, upon the verified "Complaint"; upon the Motions to Dismiss filed by the defendants; and upon oral arguments of counsel. Thereafter, the Court granted leave to counsel for the respective parties to file briefs in support of their respective contentions whereupon briefs and supplemental briefs were submitted by the respective parties. The Court thereupon took the aforesaid motions under advisement and, by its Memorandum of Opinion under date of the 5th day of July, 1968, sustained the motions of the defendants to dismiss the complaints of the plaintiffs, to which action

of the Court your Petitioners objected and excepted; all of which more fully appears from the order entered by the Court on the 15th day of July, 1968.

And now your Petitioners present this Petition to this Honorable Court setting forth all the proceedings had herein.

Statement of Facts

Your Petitioners, hereinafter sometimes referred to as Jockeys, were, on the 3rd day of May, 1968, residents of Hancock County, West Virginia, and were and continue to be jockeys by trade and profession and are currently, as well as were on and before the 3rd day of May, 1968, licensed by the West Virginia Racing Commission and which said licenses were in full force and effect at the filing of the Complaints and are at the filing of this Petition for a writ of error. Your Petitioners were riding at Waterford Park when they were individually served on the 3rd day of May, 1968, with a notice from Waterford Park, Inc., purportedly signed by James F. Edwards, its President, which said notices were dated May 2, 1968, and which advised your Petitioners as follows:

> "The management of Waterford Park, Inc., regretably finds it necessary to withdraw your privileges at all times in the future to enter or remain on the grounds of its race track and racing plant. Management sincerely hopes that you will comply with its decision without the necessity of requiring management to enforce its decision by means permitted by law. Your presence anywhere on the grounds of Waterford Park, Inc., after seven (7) days from the date of receipt of this Notice, necessarily will be construed by

management as an act of trespass for which on discovery management promptly will employ those remedial measures necessary to remove you from the grounds or pursue other legal measures to enforce its decision.

"In the event you have any personal property on the grounds of WATERFORD PARK, INC., you are given twenty-four (24) hours after the seven (7) day period expires to remove it. To remove your personal property, after the seven (7) day period expires, please first notify the guard at the stable gate who will call a member of the Security Police of WATERFORD PARK, INC., to escort you in and out of the grounds for that purpose.

"The management of WATERFORD PARK, INC., has decided permanently to deny you the privilege of admission to its grounds for the reason that such action is decidedly in the very best interests of racing generally and of racing specifically at WATERFORD PARK, INC. Management does not recite the foregoing reasons for its decision because it feels that a reason must be given, but rather to inform you that management has good cause for taking this action and will disclose the facts making up the good cause only when its attorney advises that the disclosure be made or a court of last resort compels that disclosure be made.

"Because management at WATERFORD PARK, INC., in the past has experienced some resistance in the form of threaten legal procedure to its right to exclude racing participants from its grounds, it is suggested that the following court decisions on the subject be consulted:

"*Corrigan* v. *Coney Island Jockey Club,* Two Misc. 512, 22 NYS 394

"*Madden* v. *Queens County Jockey Club,* 269 App Div 644, 58 NYS 2nd 272, affirmed, 296 NY 249, 72 NE 2nd 697, cert. denied 332 US 761, 68 S Ct 63

"*Martin* v. *Monmouth Park Jockey Club,* 145 F. Supp. 439 (Dist. Ct. N.H. 1957).

"WATERFORD PARK, INC.

"By /s/ James F. Edwards
James F. Edwards,
Its President"

Immediately your Petitioners attempted to ascertain from the Stewards at Waterford the reason for said Notices being issued, but were unsuccessful. Your Petitioners likewise attempted to enter Waterford for the purpose of plying their trade but were prohibited from entering; your Petitioners, by their counsel, did on the 7th day of May, 1968, serve upon the West Virginia Racing Commission a Petition requesting a hearing and appeal from said action of Waterford Park, Inc., and Stewards of said track, and in which said Petition your Petitioners recited that they had been offered no explanation or reasons for the action taken by the said James F. Edwards, President of Waterford Park, and that no explanation or specific reasons could be obtained and that they were guilty of no conduct upon their parts, individually or collectively, which could be construed as conduct detrimental to racing in general or racing at Waterford Park specifically; further your Petitioners respectfully requested an immediate hearing and that the West Virginia Racing Commission notify

Waterford Park pending a hearing that the notices be stayed.

By letter dated the 17th day of May, 1968, the West Virginia Racing Commission by Joseph P. Condry, Chairman, advised counsel for your Petitioners as follows:

> "Your petition requesting a hearing from this Commission, on behalf of certain named jockeys at WATERFORD PARK, INC., has been thoroughly reviewed.
>
> "Following due consideration, the Commission respectfully rules as follows: In the matter of ROBERT WILKERSON, MILTON DALGO, and RUSSELL APPLEBEE, there are no Steward ruling upon which an appeal to this Commission can be made.
>
> "Although your petition alleges action on the part of the Stewards in the case of Ray Cooper, the Commission has not received such ruling and information indicates that there is no such ruling pending.
>
> "Since there are no rulings against the named subjects and therefore, no apparent violation of the rules and regulations of this Commission, you are hereby advised that your request for hearings on behalf of the named Jockeys is denied.
>
> "Further it would appear that the relief sought by your petition is not within the jurisdiction of this Commission.
>
> "Very truly yours,
>
> "/s/ Joseph P. Condry
> Joseph P. Condry, Chairman"

Your Petitioners having exhausted the available rights afforded them by attempting to ride at Waterford, and being

excluded; attempting to ascertain the reasons but being refused; and petitioning the West Virginia Racing Commission and being denied a hearing; had no alternative but to institute and proceed upon their respective complaints against the defendants, and from which ruling of the Circuit Court of Hancock County to said Complaints, this Petition for writ of error is respectfully being submitted.

THE COURT'S ACTION

Upon the Complaints filed by your Petitioners seeking a preliminary injunction and as well a permanent injunction against the defendants from interfering in any manner with the plaintiffs in properly and lawfully pursuing their profession and trade as jockeys at Waterford or anywhere else; from interfering by violence, force, intimidation, artifice, stratagems, threats, coercion or in any manner whatsoever with the rights of your Petitioners to lawfully and properly ride at Waterford or elsewhere as the Petitioners so desire, so long as such is done within the Rules of Racing as prescribed by the State of West Virginia or other states; from interfering in any way with the Petitioners' rights of ingress or egress to Waterford Park and parts thereon where their presence may be required by virtue of their profession and trade as jockeys and from interfering with, accosting or restricting in any way whatsoever the movements of the plaintiffs within Waterford Park so long as the same is within the Rules of Racing as prescribed by the West Virginia Racing Commission or which may have been instituted by Waterford at the outset of the current meet and which were made known to the jockeys at Waterford; and from instigating, protecting, aiding, abetting or assisting anyone in the commission of the aforesaid acts, the defendant, Water-

ford Park, Inc., filed its Motion to Dismiss upon the following grounds:

"1. That it is a private corporation licensed by the West Virginia Racing Commission currently to conduct horse racing at its race track located near Newell, Hancock County, West Virginia; and that as a private corporation it has the power and inherent legal right to invite persons to participate in horse racing on its said race course, and to exclude them;

"2. That there is no West Virginia statutory enactment or judicial decision, or Rule of Racing or horse racing custom or tradition limiting or denying this defendant the right to invite persons to participate or to exclude them from participation in horse racing at its race course;

"3. That its said right to invite or to exclude applies equally to patrons and to licensees of the West Virginia Racing Commission;

"4. That the Complaint filed herein fails to state a cause of action against this defendant upon which injunctive relief may be granted;"

The Defendants, Carlyle Johnson, Jay Eyster, and Joseph P. Brocator filed their Motion to Dismiss upon the following grounds:

"1. That they are members of the Board of Stewards appointed by the West Virginia Racing Commission to serve during the racing meet currently conducted at the race track of Waterford Park, Inc., under license issued by the West Virginia Racing Commission; that

under and by virtue of the laws of the State of West Virginia, the said Board of Stewards is an agency of the said West Virginia Racing Commission which Commission under and by virtue of the laws of the State of West Virginia is an administrative agency of the said state; that as members of the said Board of Stewards, these defendants are prohibited by statute (Michie's Serial Section 2200(15)) from interfering 'in the internal business or affairs of any licensee'; that the word 'licensee' appearing in said statute refers exclusively to a racing association or other person licensed to conduct horse racing in West Virginia, as will more fully appear from a reading of Chapter 19, Article 23, Sections 1 through 17 of the West Virginia Code (Michie's Serial Sections 2200 (1) through 2200 (17)); and that the action complained of by the plaintiff in the Complaint filed in this cause is an action involving the internal affairs of the defendant, Waterford Park, Inc.;

"2. That these defendants have not and as a matter of law do not have any right to interfere with the right of the defendant, Waterford Park, Inc., to administer its own internal affairs including the relationship between it and the plaintiff(s) herein insofar as the said action complained of against the said defendant, Waterford Park, Inc., as alleged by the plaintiff herein is concerned; that the said plaintiff has not in his said Complaint alleged any violation by the defendant, Waterford Park, Inc., of any specific statute or specific rule of racing; that these defendants are not aware of the violation on the part of the defendant, Waterford Park, Inc., of any applicable statute

or any rule of racing in connection with the action complained of by the plaintiff; and that, moreover, these defendants aver and say that the said plaintiff has not alleged that he has ever made any complaint, formal or otherwise, to these defendants as individual members of the Board of Stewards, or as the Board of Stewards, concerning any action of the defendant, Waterford Park, Inc., and particularly the action complained of in his Complaint against the said defendant, Waterford Park, Inc.;

"3. That these defendants as individual members of the said Board of Stewards, or as the said Board of Stewards, have not taken any action and have not participated in the said action taken by the defendant, Waterford Park, Inc., about which action the plaintiff complains;

"4. That these defendants have not concurred in said action charged to the defendant, Waterford Park, Inc., either as individual members of the said Board of Stewards, or as the Board of Stewards, as is alleged in paragraphs numbered (12) and (15) of the Complaint filed herein; that, moreover, any concurrence on the part of these defendants individually as members of the said Board of Stewards or collectively as the Board of Stewards must be by official action, and none is alleged in the said complaint; and that the allegation contained in paragraph numbered (14) of said Complaint whereby the said action of the defendant, Waterford Park, Inc., is averred as 'a clear and unequivocal indication of the concerted activities, designs and motives of the defendants to remove from 'Waterford' any person or persons who do not con-

form to the personal desires and designs of the defendants . . . ' is not a sufficient allegation on which to predicate an injunction against these defendants;

"5. That these defendants are not charged in the said complaint with participation or conspiracy in the 'unfounded, unlawful, illegal, fraudulent and unwarranted action of "Waterford" . . . ' by the language set forth in paragraph numbered (15);

"6. That the charges of the plaintiff against this defendant as recited in paragraphs numbered (18) and (19) of the said Complaint are without factual allegations to support them, and by reason thereof are gratuitous allegations and therefore, as a matter of law, cannot serve as grounds on which injunctive relief may be lawfully predicated;

"7. That the Complaint fails to allege any official act of omission or commission against the said plaintiff by these defendants individually as members of or as the Board of Stewards at the race track of said defendant, Waterford Park, Inc., though the Complaint seeks injunctive relief against these defendants in their individual official capacities as Stewards and not in their capacities as individuals;

"8. That the said plaintiff was one of four jockeys who filed a 'Request for Hearing and Appeal from Action of Waterford Park, Inc., and Stewards of said Track'; that among the allegations contained in their 'Petition for Hearing,' the said plaintiff charged that James F. Edwards, President, gave him notice that he would forever be barred from racing at Waterford Park race track, Chester, West Virginia, and that

'no explanation or reasons for this action . . .' were given to the plaintiff herein; that in said petition the plaintiff demanded that said notice be stayed and that the said notice be permanently quashed upon a full and complete hearing of these matters'; that a copy of said 'Petition for Hearing' is hereto attached and herewith made a part hereof as though set out in full; that said 'Petition for Hearing' was received by the West Virginia Racing Commission on May 8, 1968, and on May 17, 1968, said West Virginia Racing Commission issued its opinion denying plaintiff's request for a hearing or an appeal on the following grounds:

"A. That there was no Steward ruling on the case of this plaintiff upon which an appeal to the Commission can be made;

"B. That there was no ruling against this plaintiff and, therefore, no apparent violation of the rules and regulations of the Commission;

"C. That it is apparent that the relief sought by the plaintiff in said petition was not within the jurisdiction of the Commission;

"9. That by statute, the Legislature of the State of West Virginia has created the said West Virginia Racing Commission and has granted it exclusive power and authority over the conduct of horse racing in West Virginia and to formulate reasonable rules and regulations to govern all horse racing activity in the State of West Virginia; and that, accordingly, if the plaintiff is aggrieved by any action of the said Racing Commission, the plaintiff's exclusive remedy is an

appeal from the decision of the said Racing Commission and not by the initiation of a civil action seeking by way of injunctive relief to reverse the decision of the said Racing Commission which tribunal denied the plaintiff's claim that the defendant, Waterford Park, Inc., and the action of these defendants in allegedly concurring with said action of said Waterford Park, Inc., was, as charged in paragraph numbered (9) of the Complaint filed herein, in violation of the West Virginia Racing Statutes and the rules and regulations promulgated by the West Virginia Racing Commission;

"10. That these defendants are made parties defendant to this action in their individual official capacities as Stewards and are, therefore, individual members of and administrative agency required to perform certain well-defined and expressed administrative and quasi-judicial acts, and, hence, no action for damages and no action by way of injunctive relief may lawfully be maintained against them in their said individual official capacities or in their collective capacities as a Board of Stewards for their failure to perform any administrative or quasi-judicial acts or to compel them to perform any administrative or quasi-judicial acts."

The Court granted the Motion to Dismiss of the defendant, Waterford Park, assigning the reason that, "The law would seem to be settled that a race track does have the right to exclude from the course whomsoever it pleases for whatsoever reason. This would apply equally to patrons and jockeys. . . . It is true that there is no West Virginia ruling on this issue. This Court, however, is a nisi prius

court and is bound as a matter of policy to follow the settled law of this country, unless it is in conflict with higher authority in this State. I, therefore, reluctantly rule, without regard to equities which may or may not be present on either or both of the sides of this controversy, that Waterford does have the right to exclude, whether it be patron, rider or anyone else. The sole exception so far as the cases are involved would appear to be exclusion because of race, creed or color."

The Court similarly granted the Motions to Dismiss of Carlyle Johnson, Jay Eyster and Joseph P. Brocator, all Stewards at Waterford, on the basis that they are an agency of the West Virginia Racing Commission and that venue against them was improperly laid in Hancock County.

Assignment of Errors

Your Petitioners respectfully assign the following errors:

1. That the action of the Court was contrary to the applicable law and the undisputed facts.

2. That the Court erred in sustaining the Defendants' Motions to Dismiss.

3. That the Court erred in ruling that Waterford did have the right to exclude your Petitioners "at will" under "the absolute common law right" of exclusion.

4. That the Court erred in ruling that Waterford could exclude state licensees without reason or just cause.

5. That the Court erred in ruling that Waterford, as a state licensee and creature created by the state legis-

lature to conduct horse racing and betting, has rights other than those expressly granted by the state.

6. That the Court erred in ruling, in effect, that your Petitioners, state licensees, had no judicial or administrative recourse to the actions of Waterford.

7. That the Court erred in ruling, in effect, that Waterford may act arbitrarily and capriciously against any individuals, and in particular your Petitioners, in derogation of rights granted under licenses issued by the West Virginia Racing Commission.

8. That the Court erred in granting Defendants, Carlyle Johnson, Jay Eyster and Joseph P. Brocator, parties defendants to these proceedings, Motions to Dismiss, by failing to consider the provisions of *Chapter 29A, State Administrative Procedures, West Virginia Code Annotated*, Article 4, Section 2 (b) and Chapter 29A, Article 5, Sections 1 and 4.

9. That the Court erred in granting the Defendants' Motions to Dismiss without regard to the law of West Virginia as regards licensees of the state.

10. That the Court erred in granting the Defendant's, Waterford Park, Motion to Dismiss without regard to and contrary to your Petitioners' rights under the First, Fifth and Fourteenth Amendments to the United States Constitution, and the Supreme Court of the United States' decision concerned therewith.

11. That the Court erred in holding in substance that the exclusion of state licensees, and in particular your Petitioners, was an internal matter of Waterford.

12. That the Court erred denying your Petitioners due process of law in upholding their exclusion by Waterford without any judicial recourse.

13. That the action of the Court was contrary to the West Virginia Rules of Racing which prescribe how a jockey may have his license revoked or suspended and how he is to be ruled off of a track.

Your Petitioners, therefore, pray that this Honorable Court grant them an appeal from the judgment of the Circuit Court of Hancock County, West Virginia, entered on the 15th day of July, 1968, to the end that the same may be reviewed, that a writ of error be awarded and other necessary relief granted.

ROBERT WILKERSON, RUSSELL APPLEBEE, and MILTON J. DALGO, *Petitioners*

DONELL, TARR & DELAMATER, *Counsel*

By /s/ DONALD R. DONELL
Donald R. Donell

STATE OF WEST VIRGINIA
COUNTY OF HANCOCK, to-wit:

I, DONALD R. DONELL, an attorney at law, practicing in the Supreme Court of Appeals in the State of West Virginia do hereby certify that in my opinion the judgment complained of in the foregoing Petition is erroneous and should be reviewed by the Supreme Court of Appeals of the State of West Virginia.

/s/ DONALD R. DONELL
Donald R. Donell

APPENDIX D

Copies of the Judgments of the Circuit Court of Hancock County, West Virginia and the Supreme Court of Appeals of West Virginia

IN THE

CIRCUIT COURT OF HANCOCK COUNTY,
WEST VIRGINIA

Civil Action No. 3972

ROBERT WILKERSON,

Plaintiff,

—v.—

WATERFORD PARK, INC., *et al.*,

Defendants.

Civil Action No. 3973

RUSSELL APPLEBEE,

Plaintiff,

—v.—

WATERFORD PARK, INC., *et al.*,

Defendants.

Civil Action No. 3974

MILTON J. DALGO,

Plaintiff,

—v.—

WATERFORD PARK, INC., *et al.*,

Defendants.

ORDER

These consolidated causes of action came on to be heard upon the verified "Complaints"; upon the "Motion to Dismiss" filed by the defendant, Waterford Park, Inc.; upon the "Motion to Dismiss" filed in behalf of the defendants, Carlyle Johnson, Steward, Jay Eyster, Steward, and Joseph P. Brocator, Steward; upon the separate answer of Waterford Park, Inc.; upon the separate answer of Carlyle Johnson, Steward, Jay Eyster, Steward, and Joseph P. Brocator, Steward; upon oral arguments of counsel, upon plaintiffs' "Memorandum" submitted in behalf of the plaintiffs; upon the "Supplemental Memorandum No. 2 in Behalf of Jockeys"; upon the "Supplemental Memorandum in Behalf of Plaintiffs"; upon the "Note of Argument in Behalf of Waterford Park, Inc."; upon the "Supplemental Note of Argument in Behalf of Waterford Park, Inc."; upon "Defendants' Reply to Supplemental Memorandum No. 2 in Behalf of Jockeys"; and upon the agreement of the parties that the Court first consider the issues of law raised by said Motions to Dismiss.

Thereupon the Court considered of its opinion and rendered its Memorandum.

Thereupon defendants moved that the said "Memorandum" of the Court be filed and be made a part of the record of these proceedings which motion was granted and the same Order filed and made a part of these proceedings.

Accordingly, it is ADJUDGED and ORDERED that the Motion to Dismiss of the defendant, Waterford Park, Inc., be and it is hereby granted; and the Motion to Dismiss of the said defendants, Carlyle Johnson, Steward, Jay Eyster, Steward, and Joseph P. Brocator, Steward, be and it is

hereby granted; and the said Complaints against the said defendants be and they are hereby dismissed at plaintiffs' costs. The plaintiffs, and each of them, are hereby saved exceptions to this action of the Court.

Entered this 15th day of July, 1968.

/s/ JAMES G. MCCLURE
Judge

HAVE SEEN:

/s/ DONALD R. DONELL by W. DEAN DELAMATER
Donald R. Donell *for Plaintiffs*

/s/ FRANK A. PIETRANTON
Frank A. Pietranton *for Defendants*

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 26th day of May, 1969, the following order was made and entered, to-wit;

ROBERT WILKERSON,

—VS.—

WATERFORD PARK, INC., *et al.*

RUSSELL APPLEBEE,

—VS.—

WATERFORD PARK, INC., *et al.*

MILTON J. DALGO,

—VS.—

WATERFORD PARK, INC., *et al.*

On a former day, to-wit, March 4, 1969, came the petitioners, Robert Wilkerson, Russell Applebee and Milton J. Dalgo, by Donell, Tarr & DeLaMater and Donald R. Donell, their attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Hancock County rendered in this action on the 15th day of July, 1968, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest:

/s/ GEORGE W. SINGLETON
Clerk Supreme Court of Appeals